CIRCUIT COURT OF FREDERICKSBURG.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF JOHN T. GOOLRICK, ATTORNEY FOR THE COMMONWEALTH OF FREDERICKSBURG v. E. DORSEY COLE.*

October 14, 1904.

1. MUNICIPAL CORPORATIONS—*Meeting of common council.* If all the members of a common council respond to a call, and participate in the meeting, the validity of the meeting is settled, whether rightly called or not.
2. MUNICIPAL CORPORATIONS.—*Section 117 of the Constitution.* Where there is no prohibition or limitation to the contrary, section 117 of the Constitution does not interfere with existing charters until specially amended by the legislature.
3. MUNICIPAL CORPORATIONS.—*Constitution.* The mayor's power to veto *ordinances or resolutions having the effect of ordinances*, conferred both by the Constitution and by general law, is clearly inconsistent with any claim to cast the deciding vote in case of a tie on the passage of an ordinance, *or the adoption of a resolution having the effect of an ordinance.*
4. MUNICIPAL CORPORATIONS.—*Sec. 123 of the Constitution.* The right given a mayor under the charter of a city to cast the deciding vote in the case of a tie in the election of a president of the city council is not inconsistent with the power given the mayor by sec. 123 of the Constitution.
5. CONSTRUCTION OF STATUTES.—Repeals by implication are not favored, and if a power be once conferred it exists until repealed, either expressly or by implication.
6. LEGISLATIVE POWER.—Apart from federal questions, state constitutions are not the source of legislative power and authority, but the legislatures have all power not inhibited them by the constitution.

Upon a cause of information in the nature of *quo warranto.*

The opinion states the case.

John T. Goolrick, attorney for the Commonwealth.

St. G. R. Fitzhugh, for the defendant.

HON. ALVIN T. EMBREY, Judge:

This is a cause of information in the nature of *quo warranto* filed in behalf of the Commonwealth of Virginia, by John T. Goolrick, attorney for the Commonwealth of Fredericksburg, Virginia, against the defendant, E. Dorsey Cole, requiring the said Cole to

*Reported by George C. Gregory.

show by what authority he has presided over the city council of Fredericksburg, as president thereof since September 1, 1904, and by what authority he claimed to preside over the said council at the time of filing the said petition. In response to the rule issued against him, the defendant filed his demurrer and answer to the said petition, and at the hearing of the said petition it was agreed that the exhibit filed with the said petition, signed by S. W. Sommerville and five others, though not made a part of the petition, should be taken as a part of the said petition.

No evidence was adduced before the court, it being agreed that the facts are: That on September 1, 1904, Thomas P. Wallace, then mayor of Fredericksburg, called a meeting of the council of Fredericksburg, pursuant to sec. 4, ch. 5, of the ordinance of Fredericksburg, ordinances, p. 4, which provides that it shall be the duty of the mayor "to convene the common council whenever, in his opinion, it is necessary or expedient to do so;" that the twelve councilmen, whose terms of office as such began September 1, 1904, responded to said summons, and, at the appointed time appeared in the council chamber and participated in the meeting; that Mayor Wallace stated the object of the call, and that the first thing the council should do was to organize the body by the election of its president, vice-president, secretary and other officers, as required by law; and that he would put any nomination made before the council; that while he was in the presiding officer's chair with the gavel in his hand, and presiding or virtually presiding over the council, the council, without any preliminary organization, proceeded to the election of its permanent officers; that the defendant Cole and S. W. Sommerville were both put in nomination for the presidency of the council, that each received six votes for said office; that thereupon the said Mayor Thomas P. Wallace announced the he decided the said vote in favor of the defendant, E. Dorsey Cole; that E. D. Cole immediately took the chair as president and preciding officer of said council; whereupon six of the said councilmen, whose names are given in the exhibit filed with the petition herein, "objected to the said action of the said Thomas P. Wallace and to the said action of the said E. D. Cole," which objection was ignored, and that the council proceeded with its organization, with said Cole in the chair as president thereof, electing the other officers of the council and officers of the city, such as police, city collector, etc.

It was further agreed that Fredericksburg is a city of the second class, having over 5,000 and under 10,000 population, and that its council consists of one branch.

The charter and ordinances of the city were in evidence, the same being bound in one volume and hereafter referred to as "ordinances." No question has been raised in this proceeding as to the right of the mayor of Fredericksburg to call the meeting of the council on September 1, 1904. All members of the council responded to the call, none objected, and all participated in the meeting, thus settling the validity of the meeting, whether rightly called or not. *Green Brice Ultra Vires* 439; 1 Dill. Mun. Corp., sec. 283; *Magenan* v. *Freemont,* 9 L. R. A. 791, 30 Neb. 843; *Despatch Line* v. *Bellamy Mfg. Co.,* 12 N. H. 205, 37 Am. Dec. ——.

The court is of the opinion that the rule heretofore issued in this proceeding, and this proceeding, should be dismissed.

An act to amend the charter of Fredericksburg, approved March 23, 1871 (Acts 1870-71), paragraph 4, p. 666, provides that "the mayor shall, in case of tie, give the casting vote upon all questions to be determined by the council," and prior to the present Constitution of Virginia there could be no question as to the right of the Mayor, either to preside over the meetings of the council, or, in case of tie, to give the deciding vote on all questions before the council. Has this provision of Fredericksburg's charter been repealed, either by the new Constitution or by the acts of the General Assembly of Virginia, pursuant thereto, and if repeal, is the repeal partial or entire?

Sec. 117 of the Constitution provides:

"General laws for the organization and government of cities and towns shall be enacted by the General Assembly, and no special act shall be passed in relation thereto, except in the manner provided in article 4 of this Constitution, and then only by a recorded vote of two-thirds of the members elected to each house.

"But each of the cities and towns of the state having at the time of the adoption of this Constitution a municipal charter may retain the same, except so far as it shall be repealed or amended by the General Assembly: provided, that every such charter is hereby amended so as to conform to all the provisions, restrictions, limitations and powers set forth in this article, or otherwise provided in this Constitution."

And sec. 120, after providing for the election of certain city officers, their powers and duties, in reference to the mayor, reads: "He shall have all other powers and duties which may be conferred and imposed upon him by general laws."

Sec. 123 provides that "every ordinance, or resolution having the effect of an ordinance, shall, before it becomes operative, be presented to the mayor . . ." for his veto, etc.

By Acts 1902-3-4, p. 422, as amended by act of the same session, p. 888, sec. 1033 of the Code of Virginia, was amended to conform to the provisions of the Constitution in reference to mayors of cities, and provides among other things, that the mayor "shall have all other powers and duties which may be conferred and imposed upon him by general laws."

Apart from the Federal questions, state constitutions are not the source of legislative power and authority, but the legislatures have all power not inhibited them by the Constitution. Repeals by implications are not favored; and if a power be once conferred it exists until repealed either expressly of by implication until the exercise of the earlier power given be absolutely inconsistent with the exercise of later power given. Is, then, the exercise of the mayor of the right to give the deciding vote in the case of a tie on the election of a president of the Fredericksburg council, at its initial or organization meeting, repealed by the new Constitution, or inconsistent with the later power expressly given the mayor by sec. 123 of the Constitution, the *power to veto every ordinance or resolution having the effect of an ordinance?* It seems not.

The court's construction of sec. 117 of the Constitution is that existing charters shall not be interfered with by the section until specially amended by the Legislature; provided there is no prohibition or limitation in the new Constitution of the power existing by the charter.

The sole question therefore, is: Is there in the new Constitution or in the general laws any prohibition or limitation upon the power expressly given the mayor of Fredericksburg by the charter amendment of 1871 of casting a vote in case of a tie?

By sec. 120, read in connection with sec. 117, certain defined powers are given the mayor, and such other additional powers as may be conferred upon him by general laws. There is no conflict between these powers and additional already existing powers given

by the charter of Fredericksburg, and recognized and ratified by sec. 117 of the Constitution, unless the exercise of such power given by sec. 120 would render impossible the execution of the powers conferred by the charter.

Sec. 117 is a ratification of every power not specially in conflict with the enumerated powers given the mayor by sec. 120. To the exclusive right to future legislation by general law, the right to amend existing charters by special legislative act is expressly given by sec. 117, and by the same section, cities of the state having municipal charters at the time of the adoption of the Constitution (July 10th, 1902) are expressly authorized "to retain the same," "provided, that every such charter is hereby amended so as to conform to all the provisions, restrictions, limitations and powers set forth in" article 8 of the Constitution, or otherwise provided in that instrument. The Constitution does not read that no mayor of any city shall have any power other than is given in the Constitution or conferred by general law; but it does seem that the mayor, by the ratification of the city's charter by sec. 117, has any and all special powers heretofore conferred upon him by the charter except where such powers have been specially repealed or are inconsistent with later power conferred; and it is no answer to this position to say that because the mayor is no longer under act of 1902-3-4, the presiding officer of the council, that it would be inconsistent with the spirit of the law and not in harmony with the government of the state and its political subdivisions to repose in an officer, not a member of a body, the power by the deciding vote to break a tie in that body.

Under the former Constitution, by legislative enactment, the county court judge was directed in case of a tie vote in the board of supervisors of a county to give the deciding vote, and this, notwithstanding the county court judge was a state judicial officer, elected by the Legislature and was not a member of the board of supervisors, a ministerially and *quasi* legislative body of county officers, elected by the voters of the county. Code 1887, sec. 832.

And after the adoption of the present Constitution a tie vote in the board of supervisors was broken by the Commonwealth's attorney, a state officer, and an arm of the executive branch of the government, giving the deciding vote, though he is not a member of the board of supervisors (Acts 1902-3-4 pp. 855-6), while this act was

later amended, and now a tie vote in the board of supervisors is broken by the deciding vote of a commissioner in chancery of the circuit court, an arm of the judicial department of the government, specially designated by the circuit court or the judge thereof in vacation for that purpose. Acts 1904, pp. 254-5.

The mayor's power to veto *ordinances, or resolutions having the effect of ordinances,* conferred both by the Constitution and by general law, is clearly inconsistent both with any claim to cast the deciding vote in case of a tie on the passage of an ordinance, or the *adoption of a resolution having the effect of an ordinance,* and no such claim is asserted in this proceeding.

The mayor has no veto power in case of elections; and the organization of a city council is a political necessity. A tie is more likely to occur upon questions involving political considerations, and arises most often as to the creations of offices, or appointments to office. I see no reason for adoption of a narrow construction of a provision plainly adapted to the prevention of "deadlocks," as held by the Connecticut Supreme Court of Errors in *State ex. rel. Ryland* v. *Pinkerman,* 63 Conn. 176, which are never more injurious to good government than when the result of a contest which keeps vacant an office that the public interests require to be filled.

That an *ordinance, or a resolution having the effect of an ordinance,* is not one and the same thing, as an *election to the presidency of a council at its initial or organization meeting,* seems to me to be clear. A councilman is a public officer, and a public servant; his position is a public trust, and is by no means held by him for his own benefit. Under rare, if an, circumstances would his vote be permitted, received or counted for or against any ordinance, or resolution having the effect of an ordinance in which he were personally interested or about which he were pecuniarily concerned: yet, on the tie vote for the presidency of the Fredericksburg council, each candidate, the defendant E. Dorsey Cole and S. W. Sommerville, voted for himself, and this vote on their own election seems to be sustained by legal principle as well as by parliamentary precedent. *Phillips* v. *Eyre,* L. R. 4 Q. B. 225, 235.

"This distinction," says the Connecticut Court or Errors in the case above cited," was strongly emphasized in the discussion arising upon a motion made in the Senate of the United States in 1866 to disallow Senator Stockton's vote upon a resolution declaring him

entitled to retain his seat." Senator Foster, then president of the Senate, a distinguished parliamentarian, and afterwards a member of the Connecticut Supreme Court, held that the chair could not exclude Senator Stockton's vote, but that the Senate could; and during the debate, Senator Sherman, of Ohio, declared that he had himself, on one occasion, determined that should his vote be necessary to secure his election to another position for which he had been placed in nomination, his duty to his constituents would require him to give it. Similar views were expressed by Senator's Trumbull, of Illinois, and Reverdy Johnson, of Maryland. Cong. Globe. 1st session 39th Congress, pp. 1602, 1636, 1643, 1647. *State ex. rel. Rylands* v. *Pinkerman,* 63 Conn. 176.

There appearing to be no inconsistency between the mayor's power, conferred by general law and by constitutional enactment, to veto ordinances and resolutions having the effect of ordinances, and to cast the deciding vote in case of a tie on the election of a president to the council at its initial, or organization meeting, there is no conflict in any of the enumerated powers given the mayor by the Constitution, or by general law, with the right of the mayor of Fredericksburg to cast the deciding vote, in case of a tie in the election of a president of the council of Fredericksburg at its initial or organization meeting on September 1, 1904; and therefore I think that the act of March 23, 1871, to that extent, has not been interfered with by the Constitution or general law.

For these reasons the rule heretofore awarded in the proceeding against the defendant, E. Dorsey Cole, and this proceeding against the said defendant, E. Dorsey Cole, must be dismissed and an order will be accordingly so entered.

NOTE.—Upon a petition for a writ of error in this case the same was refused by the Supreme Court of Appeals. O. B. 33, p. 284.